IN THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH

C.W.P. No. 17302 of 2007

Date of Decision: 20.12.2007

E.C.E. Industries Limited

…Petitioner

Versus

State of Punjab and others

…Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE RAKESH KUMAR JAIN

Present: Mr. D.S. Brar, Advocate,
for the petitioner.

Mr. Amol Rattan Singh, Addl. AG, Punjab,
for respondent Nos. 1 to 3.

Mr. Rakesh Gupta, Advocate,
for respondent No. 4.

M.M. KUMAR, J.

The instant petition filed under Article 226 of the Constitution prays for quashing detention order dated 7.11.2007 (P-3) and subsequent proceedings thereto. It has further been prayed that direction be issued to respondent Nos. 2 and 3 to release the goods and vehicle with documents without any further delay.

Brief facts of the case are that the petitioner company is engaged in the manufacturing/fixation of elevator and is a registered dealer under the U.P. Sales Tax Act and Central Sales Tax Act, 1956

(for brevity, 'the CST Act'). During the course of its business the petitioner-company agreed with E.P. (India) Ltd.-respondent No. 4 to supply and fix ECE Elevator at site No. 5 of Punjab National Bank, Ferozepur Road, Ludhiana. On 31.7.2007, contract was signed prescribing dimensions of the lift and for carrying out installation etc. (P-1). The petitioner-company dispatched the goods vide challan-cum-invoice No. 185, dated 6.11.2007 and challan CED/GZB No. 112, dated 6.11.2007 to respondent No. 4 (P-2 & P-2A). It is claimed that the bills contained all the particulars of the goods viz. quantity, quality, price, tax charged etc. The goods entered Punjab through ICC Import, Shambu Barrier, District Patiala, in verhicle No. HR-39A-9841 belonging to Union Roadways Corporation. On 7.11.2007, the goods were detained by respondent No. 2 vide notice/detention order No. 94, dated 7.11.2007 (P-3) and the following objection was raised:-

> "TIN No. of Pb. & G.R. consignee not mentioned. As per G.R. goods are to be unloaded at Party godown's of the consignor. Seems to be a works contractor. Needs verification."

The petitioner was required to attend the office of respondent No. 2 on 10.11.2007 at 10.00 a.m. to explain the correctness of the documents which were taken into possession by respondent No. 2. Accordingly, the representative of the petitioner approached respondent No. 2 and gave explanation in writing mentioning that VAT No. was not required by the petitioner because

it is not doing any business which may amount to sale in the State of Punjab. The goods were meant for self and non-mentioning of VAT No. in the invoice is no deficiency under the rules, giving rise to the detention of the goods, vehicle and documents (P-4). Lateron, respondent No. 2 referred the matter to respondent No. 3. Despite accepting the validity of the documents, the goods were not released and respondent Nos. 2 and 3 insisted for assessment of goods and payment of penalty. The petitioner at that stage approached this Court by filing instant petition. It has been pointed out that under the same facts and circumstances on an earlier occasion also, respondent No. 2 detained the goods of the petitioner, vide detention order/notice No. 18, dated 21.11.2006. When the stand of the petitioner was not accepted, the petitioner approached this Court by filing C.W.P. No. 19392 of 2006. After issuance of notice of motion by this Court, the respondents processed the case and released the goods/documents vide release order dated 8.12.2006 (P-7). In the present case the respondents are deviating by following different course, which is not permissible in law.

In the reply filed on behalf of respondent Nos. 2 and 3, by way of affidavit the stand taken is that the relationship between the petitioner and Engineering Products (India) Ltd.-respondent No. 4 is that of a contractor and contractee and tax is to be paid on the goods involved in a ‘works contract’. It is emphasised that it is ‘works contract’. It has been asserted that in the present case neither the contractor nor the contractee are registered under the Punjab Value

Added Tax Act, 2005 (for brevity, 'the Act') and the CST Act, in the State of Punjab. It is claimed that they are liable to pay tax and are obliged to file returns in accordance with the provisions of the Act.

It has further been asserted that the petitioner has deliberately withheld the VAT number of the consignee-respondent No. 4. A reference has been made to Section 2(z)(u) of the Act to assert that it included any agreement for carrying out for cash even installation or commissioning of any movable or immovable property. It has also been claimed that the petitioner is covered by expression 'person' used in Section 2(t) of the Act. The respondents have claimed that the petitioner was required to come forward for getting the goods released in accordance with the provisions of Section 51(6) of the Act, which require furnishing of adequate security equivalent to the amount of penalty and tax involved, despite the fact that notice under Section 51(7)(b) of the Act was issued. It is repeatedly claimed that the petitioner is conducting its business in the State of Punjab on regular basis and is, thus, required to get itself registered and file regular returns.

The petitioner has filed replication by controverting the stand taken by respondent Nos. 2 and 3 and reiterating its stand taken in the petition. It has been denied once again that it was a 'works contract', asserting that it is merely a contract for supply of goods. The petitioner has insisted that no sale of goods has taken place in the State of Punjab and, therefore, there is no attempt to evade the value added tax and that the installation of the lift is only incidental to the

supply of goods. The petitioner has also claimed that it is not required to be registered under the Act nor liable to pay any tax by stating that in similar circumstances in the year 2006, the stand of the petitioner was accepted. It filed C.W.P. No. 19392 of 2006, which was rendered infructuous and was withdrawn. The petitioner stated to have charged Central Sales Tax on the sale of gods as per invoices at Annexure P-2 and P-2/A and, therefore, it has to be recorded as inter-State sale.

The stand of respondent No. 4 in its written statement that it is Government of India enterprise, which is under the over all control of Ministry of Heavy Industries. It was awarded the work for construction of Zonal Office building of the Punjab National Bank at Ludhiana on turnkey basis and that an agreement to this effect was executed between respondent No. 4 and the Punjab National Bank on 14.12.2004 (R-4/1), which is claimed to be executing agency and is entitled to 10.5% as fee out of the total actual costs of the project. It has invited tenders for design, manufacture, supply, installation, testing and commissioning of 10 metre per second lifts having capacity of 10 passengers for the Zonal Office building of the Punjab National Bank and accordingly the petitioner was found suitable for supply and execution of the work. As such, the work order was issued to the petitioner by respondent No. 4 in their capacity as executing agency on behalf of the Punjab National Bank. According to respondent No. 4, it is not selling any material whatsoever, which is being used for execution of work for the Punjab National Bank and

accordingly, it has not applied for registration under the Act in the State of Punjab, although it has Tax Deduction Number (T.D.N.), dated 26.2.2006, for deposit of VAT/Tax, which is deducted @ 2% from various contracting agencies.

Mr. D.S. Brar, learned counsel for the petitioner has submitted that last year also the petitioner faced with similar difficulties, which resulted in filing of C.W.P. No. 19392 of 206 and the aforementioned petition was dismissed as withdrawn because after issuance of notice for admission of petition, the goods belonging to the petitioner were released, as is evident from perusal of order dated 8.12.2006 (P-7). He has pointed out that the goods were nothing else but lift parts, which have been brought in knock down condition. Therefore, learned counsel has submitted that every time a lift is supplied to a buyer in the State of Punjab, the petitioner cannot be put to unnecessary curbs and harassment, especially when the position stands settled. He has further submitted that the provisions of Section 21 of the Act, requiring registration by any person, would not apply to the petitioner as the expression 'person' in Section 2(t)(i) of the Act does not cover a person like the petitioner, who is not engaged in the business of transfer of goods for cash or default payment or for other valuable consideration. He has maintained that he is covered by a written contract. According to learned counsel, the petitioner has been paying Central Sales Tax @ 12.5% under the CST Act and is not liable to pay any tax on inter-State sale. He has then submitted that the provisions of Section 51 of the Act would also not

apply to the case of the petitioner as the petitioner is not assessable to tax under the Act. In support of his submission, learned counsel has placed reliance on a judgment of Hon'ble the Supreme Court in the case of **State of Andhra Pradesh v. Kone Elevators (India) Ltd., (2005) 140 STC 22**.

According to learned counsel, the aforementioned judgment squarely cover the case of the petitioner and the contract entered into by the petitioner on 31.7.207 (P-1) cannot be regarded as a 'works contract'. He has maintained that 'installation' of lifts is only incidental. Another argument raised by Mr. Brar is that in response to tender floated by respondent No. 4, the petitioner was successful and in pursuance of the tender agreement, the goods like lifts are being supplied, which included installation.

Mr. Amol Rattan Singh, learned State counsel, however, has submitted that the petitioner was required to furnish declaration in Form VAT-12, VAT-36, VAT-35, VAT-37 and VAT-38, under Rule 63 of the Punjab Value Added Tax Rules, 2005 (for brevity, 'the Rules'). The petitioner was also required to disclose the TIN number of the consignee, which was deliberately withheld. Learned counsel has further submitted that the agreement dated 31.7.2007 (P-1) between the petitioner and respondent No. 4 is nothing else but a 'works contract', which includes, as per definition given in Section 2 (zu) of the Act, installation, fitting out or commissioning of any movable or immovable property. He has also drawn our attention to the expression 'sale price' used in Section 2(zg) of the Act and the

expression 'person'. He has then placed reliance on Section 21 of the Act to argue that no person could carry on business in the State of Punjab, unless he is registered under the Act. He has made efforts to distinguish the judgment in Kone Elevators case (supra).

After hearing learned counsel for the parties at a considerable length, we are of the considered view that this petition merits acceptance. The primary question which require determination in this matter is whether the sale of lifts by the petitioner to respondent No. 4 in pursuance to agreement dated 31.7.2001 (P-1), entered into between the petitioner and respondent No. 4, was an inter-State sale or intra-State sale attracting payment of Value Added Tax under the Act. In that regard the transaction is required to be subjected to a test as laid down by a Constitution Bench of Hon'ble the Supreme Court in the case of **State of A.P. v. National Thermal Power Corporation Ltd., (2002) 5 SCC 203**. Discussing as to what would be a sale in the course of inter-State trade, it has been held in para 24 as under:-

> " 24. It is well settled by a catena of decisions of this Court that a sale in the course of inter-State trade has three essential ingredients: (i) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-State movement of goods; (ii) the goods must actually move from one State to another, pursuant to such contract of sale, the sale being the proximate cause of movement; and (iii) such movement of goods

> must be from one State to another State where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which takes place independently of a contract of sale would not fall within the meaning of inter-State sale. In other words, if there is no contract of sale preceding the movement of goods, obviously the movement cannot be attributed to the contract of sale. Similarly, if the transaction of sale stands completed within the State and the movement of goods takes place thereafter, it would obviously be independently of the contract of the contract of sale and necessarily by or on behalf of the purchaser alone and, therefore, the transaction would not be having an inter-State element. ……"

In the National Thermal Power Corporation's case (supra) the question for determination was whether the sale of electricity by the National Thermal Power Corporation Limited (NTPCL) to the Electricity Boards situated outside the State of Andhra Pradesh and to the State of Goa can be construed as inter-State sale or intra-State sale. The Constitution Bench held the sale of electricity by the NTPCL as inter-State sale attracting no duty under the A.P. Electricity Duty Act, 1939.

The facts in the present case when examined in the light of the tests laid down by the Constitution Bench of Hon'ble the Supreme Court would show that the first condition of contract

incorporating a stipulation concerning inter-State movement of goods is in existence. A perusal of agreement of sale, dated 31.7.2007 (P-1) would show that the aforementioned condition stand satisfied. According to the recital read with clause 1 of the contract, the petitioner was to supply two lifts as per design, manufacture, supply, installation, testing and commissioning at Ferozepur Road, Ludhiana, Punjab. The recital alongwith clause 1 reads as under:-

> "With reference to the above mentioned correspondence, Engineering Projects (India) Ltd., is pleased to place order on M/s ECE Industries Ltd. covering its LOI as mentioned above for Design, Manufacture, Supply, Installation, Testing and Commissioning of 2 (two) nos. 10 passenger (680 Kgs) capacity, 1.0 M/sec speed Lifts for Zonal Office Building for Punjab National Bank under construction at Ferozpur Road, Ludhiana, Punjab, at total firm estimated price of Rs. 30,64,000.00 (Rupees Thirty Lakhs Sixty Four Thousand only) inclusive of all taxes, duties, levies etc. as per BOQ at Annexure-I
>
> The Terms & Conditions governing the order shall inter-alia include the following:-
>
> 1. SCOPE OF WORK:-
>
> Design, Manufacture, Supply, Installation, Testing and Commissioning of 2 (two) nos. 10 passenger (680 Kgs) capacity, 1.0 M/sec speed Lifts for Zonal Office Building RCC frame structure

(Basement and ground plus 4 upper floors) under construction for Punjab National Bank at Ferozpur Road, Ludhiana, Punjab."

The second condition that the goods must actually move from one State to another in pursuance to contract of sale, the sale being the proximate cause of movement stand also fulfilled because both the lifts according to specification were supplied to respondent No. 4 at Ludhiana, as is evident from the invoice dated 6.11.2007 (P-2). The invoice further shows that Central Sales Tax @ 12% stood paid. Therefore, the proximate cause of movement was the contract of sale although installation was also involved, which is incidental. The third condition that such movement of goods must be from one State to another State where the sale has been concluded is also obviously stands satisfied because the goods have moved from New Delhi to the State of Punjab. Therefore, the tests laid down by the Constitution Bench are satisfied in the present case.

It is further pertinent to mention that the distinction between the 'contract for sale' and 'works contract' was highlighted by Hon'ble the Supreme Court in the case of Kone Elevators (India) Ltd. (supra). Dealing with the case of installation of lifts, their Lordships' have observed in para 5 of the judgment the basic attributes demarcating both 'contract for sale' and 'works contract' and emphasised that largely it is a question of fact depending on the terms of the contract. The observations in para 5 of the judgment reads as under:-

" 5. It can be treated as well-settled that there is no standard formula by which one can distinguish a "contract for sale" from a "works contract". The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged thereunder and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a "contract of sale", the main object is the transfer of property and delivery of possession of the property, whereas the main object in a "contract for work" is not the transfer of the property but it is one for work and labour. Another test often to be applied to is: when and how the property of the dealer in such a transaction passes to the customer: is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion t the movable property of the customer? If it is the former, it is a "sale" ; if it is the latter, it is a "works contract". Therefore, in judging whether the contract is for a "sale" or for "work and labour", the essence of the contract or the reality of the transaction as

> a whole has to be taken into consideration. The predominant object of the contract, the circumstances of the case and the custom of the trade provides a guide in deciding whether transaction is a "sale" or a "works contract". Essentially, the question is of interpretation of the "contract". It is settled law that the substance and not the form of the contract is material in determining the nature of transaction. No definite rule can be formulated to determine the question as to whether a particular given contract is a contract for sale of goods or is a works contract. Ultimately, the terms of a given contract would be determinative of the nature of the transaction, whether it is a "sale" or a "works contract". Therefore, this question has to be ascertained on facts of each case, on proper construction of terms and conditions of the contract between the parties."

When we examined the agreement of sale, dated 31.7.2007 (P-1) between the petitioner and respondent No. 4 in the light of the observations made by Hon'ble the Supreme Court, it becomes patent that the main object of installation of lifts at the Zonal Office Building for the Punjab National Bank under construction, was not one for 'work and labour' because the lifts have been transported and supplied to respondent No. 4 under the agreement in a semi-knocked down condition, which were to be installed at the Zonal Office Building for the Punjab National Bank. The installation part is

only an incidental whereas the subject matter in pith and substance is sale of lifts, as has been observed by Hon'ble the Supreme Court in para 12 of the judgment in Kone Elevators (India) Ltd. (supra) itself. It has been observed that the supply part included installation of lift and the contractual obligation of the petitioner was only to supply and install the lifts while the obligation of respondent No. 4 was to keep the site ready for installation as per the drawings and designs. Therefore, examined from any angle, the contract between the parties is one of 'contract for sale' and not a 'works contract'.

We are further of the view that respondent Nos. 1 to 3 cannot keep on shifting their stand because when the petitioner faced similar difficulty in 2006 and the lifts in knocked down condition were detained, it has filed C.W.P. No. 19392 of 2006. The writ petition was dismissed as withdrawn having been rendered infructuous because the respondents have released the goods by passing an order on 8.12.2006 (P-7), which read, thus:-

> " The goods i.e. lift parts of M/s E.C.E. Industries Limited c/o M/s Raj Rajeshwari Builders, Ludhiana which was being carried in vehicle No. PB-13-F-6084 for trade was detained under section 51(6) of the Punjab VAT Act, 2005 on 21.11.2006 for verification. The said vehicle and gods have been ordered to be released after verification by the Assistant Excise and Taxation Commissioner vide order dated 08.12.2006. The

document in which the details of the goods have been mentioned, have been retained for further action."

The aforementioned order has attained finality and has been accepted by the respondents. Once this is an admitted position, no contradictory stand could be taken by the respondents. For that reason also, the petitioner has to be granted the relief.

The argument of the learned State counsel that the petitioner is executing a 'works contract', which would include installation of any goods brought in the State of Punjab, has not impressed us merely because the expression 'installation' has been used in the term 'works contract' as defined in Section 2(zu) of the Act because that will not change the character of the 'contract for sale' to that of a 'works contract'. The argument is wholly misconceived and is, thus, liable to be rejected.

For the reasons mentioned above, this petition succeeds and the same is accordingly allowed. Consequently, the detention order dated 7.11.2007 (P-3) and all subsequent proceedings in pursuance thereto, are hereby quashed. The respondents are directed to release the goods of the petitioner forthwith.

(M.M. KUMAR)
JUDGE

(RAKESH KUMAR JAIN)

December 20, 2007 **JUDGE**
Pkapoor/shalini

FIT FOR INDEXING